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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA**

FILED

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**U.S. DISTRICT COURT
N.D. OF ALABAMA**

UNITED STATES OF AMERICA,

v.

RICHARD M. SCRUSHY,

Defendant.

CR-03-BE-0530-S

**DEFENDANT RICHARD M. SCRUSHY'S
MOTION FOR DISCOVERY**

(Authorities Included)

Pursuant to Federal Rule Criminal Procedure 16 and this Court's December 30, 2003 Scheduling Order, defendant Richard M. Scrushy moves this Court to order certain discovery from the Department of Justice in this case.

Through its Scheduling Order, this Court ordered that certain discovery occur on or before certain dates. The Court ordered, *inter alia*, that all discovery under F.R.Crim.P. 16(1)(A), (B), (D), (E), and (F) requested by the defendant be provided by January 23, 2004 and that all material subject to Brady v. Maryland and its progeny, and Giglio v. United States and its progeny, shall be completed no later than January 30, 2004. The Court further ordered that the government provide notices required under F.R.Evid. 404(b) no later than March 26, 2004. On December 31, 2003, Mr. Scrushy sent a comprehensive discovery request letter pursuant to various provisions of the criminal rules and cases applying those rules. Exhibit A, December 31, 2003 Letter From Abbe D. Lowell to Alice H. Martin, United States Attorney's Office, and Richard C. Smith, Department of Justice.

The Department just responded in a January 21, 2004 letter. A number of the government's replies are that it will be providing various information in the future. In addition, the Department of Justice and the defendants have begun the discovery process. To date, the government has provided several hundred boxes it has stated it received from individuals and entities other than Richard M. Scrushy.

However, the government has yet to provide certain categories of information, including but not limited to: any written or recorded statement of any co-conspirators, any Brady information, including any such information contained in statements of co-conspirators that discuss the lawful activities of Richard M. Scrushy and/or the innocent nature of his acts, electronic discovery contained on discs in the possession of the government, the existence of and/or copies of video, audio or wire taps or other recordings, prior criminal convictions and other Giglio of co-conspirators, information concerning deals between the government and any co-conspirator, grand jury or other witness involved in this investigation, information about disciplinary and other personnel actions regarding law enforcement investigators or attorneys who worked on this investigation, grand jury empanelment and process information, notes of interviews that underline any formal interview memoranda of co-conspirators and witnesses, and the formal memoranda of same. On Thursday, government attorneys indicated they might want an extension to the present deadline for making discovery available.

While Mr. Scrushy will continue to work with the government to insure the completion of all discovery, he is making this protective motion as the deadline for non-dispositive motions is presently January 26, 2004. Should the parties resolve the issues before any hearing date, Mr. Scrushy will promptly notify the Court. If issues of discovery remain (beyond those being addressed in separate motions, for example the Motion for a Bill of Particulars and a Motion to

Strike Surplusage), Mr. Scrushy would like to address them at whatever hearing the Court schedules to address the non-dispositive motions.

Dated: January 26, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Abbe David Lowell", written over a horizontal line.

Abbe David Lowell, Esq.
Thomas V. Sjoblom, Esq.
Chadbourne & Parke, LLP
1200 New Hampshire, Ave. NW
Washington, D.C. 20036
(202) 974-5600

A handwritten signature in black ink, appearing to read "Arthur W. Leach", written over a horizontal line.

Arthur W. Leach, Esq.
c/o Thomas, Means, Gillis & Seay
1035 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 328-7915


Attorneys for Defendant
Richard M. Scrushy

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2004, a copy of the foregoing Richard M. Scrushy's Motion for Discovery was served by facsimile and overnight mail to:

Alice Martin, Esquire
United States Attorney for the
Northern District of Alabama
U.S. Department of Justice
1801 4th Avenue North
Birmingham, Alabama 35203

Richard C. Smith, Esquire
Deputy Chief
Fraud Section
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530


Julie A. Campbell
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1200 New Hampshire, Ave. NW
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Abbe David Lowell
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December 31, 2003

VIA FACSIMILE AND FIRST CLASS MAIL

Alice H. Martin, Esquire
United States Attorney
U. S. Attorney's Office
Northern District of Alabama
1801 Fourth Avenue North
Birmingham, Alabama 35203

Richard C. Smith, Esquire
Deputy Chief
Criminal Division, Fraud Section
Department of Justice
1400 New York Avenue, NW
Washington, D.C. 20005

Re: United States v. Scrushy
Case No. CR-03-BE-0530-S

Dear Ms. Martin and Mr. Smith:

Please consider this letter our request for discovery under Rules 6, 16 and 17 of the Federal Rules of Criminal Procedure, Rules 404(b) and 801 of the Federal Rules of Evidence, 18 U.S.C. §§ 2510 et. seq., 18 U.S.C. §§ 3500 et seq., *Brady v. United States*, and *Giglio v. United States*. We will supplement these requests in the future. However, at this time we specifically request:

A. F. R. Cr. P. Rule 16(a)(1)(A), (B), (D), (E), (F)

1. All oral statement statements made by the defendant Richard M. Scrushy or materials which purport to set out, describe or summarize any statement made by Mr. Scrushy.
2. All written or recorded statements made by the defendant Richard M. Scrushy or on which Mr. Scrushy's voice can be heard.

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3. Any written or recorded statement or the substance of any oral statement as to which the government will claim that Mr. Scrushy manifests his adoption or belief in its truth. *See* Fed. R. Evid. 801(d)(2)(B)
4. Any written or recorded statement or the substance of any oral statement made by another individual or entity which the government alleges was authorized by Mr. Scrushy or which the government claims is an admission of Mr. Scrushy. *See* Fed. R. Evid. 801(d)(2)(C).
5. Any written or recorded statement or the substance of any oral statement by Mr. Scrushy in what the government alleges to be the course of and conversation in furtherance of the conduct alleged in the Indictment. *See* Fed. R. Evid. 801(d)(2)(E).
6. All books, papers, documents, data, photographs, tangible objects, or other materials (a) referred to or on which basis the allegations in the Indictment were returned; (b) material to preparing the defense of this case; (c) the government intends to use in its case-in-chief; (d) that was obtained from Mr. Scrushy. This material should include but not be limited to:
 - (1) all documents which reflect the financial, tax or other similar calculations on which any allegation in the Indictment is based;
 - (2) all documents which reflect Mr. Scrushy's alleged agreements to act unlawfully with any other person;
 - (3) all documents on which the government has based its claim that there was a \$2.7 billion fraud/loss at HealthSouth or any other amount the government claims to be the fraud/loss involved in the Indictment;
 - (4) all documents on which the government intends to support its position that there was an atmosphere of intimidation at HealthSouth, including invoices, bills, payments or other records for surveillance equipment, disguises, rifles, handguns, hand-grenades or any other weapon;
 - (5) all documents on which the government relies for its claims that the assets listed in the Indictment and in the affidavit filed by Agent Charles Traywick are forfeitable (including the Clifton Gunderson, LLP report referred to in the Traywick affidavit);

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- (6) all documents on which the government alleges that the individuals it believes to be co-conspirators of the defendant made entries, changes or modifications forming the basis of the charges in the Indictment;
 - (7) all documents that any of the individuals the government believes to be co-conspirators of the defendant took originals or copies from their offices or the files of HealthSouth and kept in their houses or other places outside the office;
 - (8) all documents sent to the S.E.C. or to shareholders in which the government alleges there was misinformation concerning HealthSouth;
 - (9) all documents, including tapes and transcripts, of conferences or investor calls alleged in the Indictment;
 - (10) all videotapes of any meetings at HealthSouth or concerning HealthSouth in which Mr. Scrushy or any of the individuals who the government believes to be co-conspirators are pictured or in which their voices can be heard;
 - (11) all e-mails referred to in the Indictment and e-mails between and among all the individuals who the government believes to be co-conspirators in the Indictment;
7. All results or reports of any physical or mental examination and any scientific test pertaining to this case.
8. The defendant does not have any other offense in his background; if the government contends to the contrary, provide any proof of such offense and record.

B. 18 U.S.C. §§2510 et. seq.

Please provide:

- 1. Access to and access by experts to the original of any tape, digital file, or other medium the government used to record the voices of Mr. Scrushy or any of the witnesses whose testimony formed the basis of the Indictment or who the government intends to call at trial.
- 2. All toll, billing, and/or other telephone records pertaining to any and all telephones subscribed to or used by Mr. Scrushy and all records reflecting the

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results of pen register devices and/or trap and trace devices on any such telephones.

3. All wiretap materials including applications, orders, ten-day reports, minimization memoranda, monitoring logs, and pertinent call sheets that relate to the investigation or written confirmation that there was no such applications or wiretapping.

C. Brady v. Maryland

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *United States v. Agurs*, 427 U.S. 97 (1976) and *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, defendant request disclosure of all exculpatory or impeaching material in the United States' possession, custody, or control, the existence of which is known or by the exercise of due diligence may become known to the government. The review by the U.S. Attorney's Office and the Department of Justice should include inquiries to at least the following agencies: the Securities and Exchange Commission, the Internal Revenue Service, the Fraud, Asset Forfeiture, Organized Crime and other sections of the Criminal Division of the Department of Justice, the FBI (and the agents who investigated the case), and the Department of Health and Human Services. The review for this information should include but not be limited to:

1. Any statement by any person or his or her agent that references the lawful activities of Richard Scrushy;
2. Any of the following material:
 - a. statements or materials concerning Mr. Scrushy's management style,
 - b. statements or material that describe Mr. Scrushy's practices with respect to writing or reading financial information or reading accounting information;
 - c. statements or materials describing the inability to know the actions or activities of employees at a large corporation or business;
 - d. statements or materials describing activities undertaken by any individual at HealthSouth to conceal his or her activities with respect to the allegations contained in the Indictment;
 - e. statements or materials describing the means by which those the government has charged with wrongdoing hid their actions from others;

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- f. materials that any individual charged by or cooperating with the government removed from his or her office before or during the investigation;
 - g. materials which indicates assets of any member of the Scrushy family were not derived from or traceable to any activity alleged in the Indictment; and
 - h. statements by any individual which contradict the statements of any of the individuals who is cooperating with the government.
- 3. Any and all records and information revealing prior criminal convictions or guilty verdicts or juvenile adjudications, including but not limited to relevant "rap sheets" on each witness the prosecutor relied on to obtain this Indictment and/or intends to call at trial.
- 4. Any and all records and information revealing prior or subsequent misconduct, criminal acts or bad acts (including failure to comply with instructions or provisions of any formal or informal cooperation agreement) of any witness the government relied on to obtain the Indictment and/or who the government intends to call at trial.
- 5. Any and all consideration or promises of consideration given during the course of the investigation and preparation of this matter by any law enforcement officials, including prosecutors or agents, police or informers, to or on behalf of any witness the government relied on to obtain the Indictment and/or who the government intends to call at trial. Such "consideration" refers to anything that arguably could be of value or use to a witness, including but not limited to formal or informal, direct or indirect, leniency, favorable treatment or recommendations, or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, administrative, or any other matter involving the state or federal government, any other authority, or other parties; civil, criminal, or tax immunity grants; payments of money, rewards or fees, witness fees, and special witness fees, provisions of food, clothing, transportation, legal services, or other benefits; letters to anyone informing the recipient of the witness' cooperation; recommendations concerning governmental aid or benefits; registration; promises to take affirmative action to help the status of the witness in a profession, business, or employment, or promises not to jeopardize such status; aid in efforts in

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securing or maintaining the business or employment of a witness; and anything else that arguably could reveal an interest, motive or bias in the witness in favor of the prosecution or against any defendant or act as an inducement to testify or to color his testimony.

6. Any and all threats, express or implied, direct or indirect, or other coercion directed against any witness or anyone related by blood or marriage to the witness, whom the prosecutor relied on to obtain this indictment and/or intends to call at trial; criminal prosecutions, investigations or potential prosecutions pending or which could be brought against any such witness or anyone related by blood or marriage to the witness; any probationary, parole, or deferred prosecution status of any such witness or anyone related by blood or marriage to the witness; and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions involving any such witness, or anyone related by blood or marriage to the witness, and the state or federal government, or over which the state or federal government has real, apparent, or perceived influence
7. A list of any and all requests, demands, or complaints made to the government by the witness that arguably could be developed on cross-examination to demonstrate any hope or expectation on the part of the witness for favorable governmental action on his behalf (regardless of whether or not the government has agreed to provide any favorable action);
8. All documents and other evidence regarding drug and alcohol usage and/or dependency by any individual the United States intends to use as a witness at trial including but not limited to records relating to treatment of such individual in any federal, state, territorial, city, or military drug or detoxification program.
9. All documents and other evidence regarding any physical or mental disease, disability or disorder affecting any individual the government relied upon to obtain this indictment and/or intends to use as a witness at trial, or any member of the immediate family of any such witness, including but not limited to records of hospitalization or to his treatments for such physical or mental disease, disability, or disorder.

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10. Any material not otherwise listed that reflects or evidences the motivation of any witness to cooperate with the United States or reflects or evidences the competency or credibility of the United States' witness, or the witness' bias or hostility against Mr. Scrushy.
11. A list of all other judicial proceedings involving a criminal matter in which any person who is a potential prosecution witness in this action participated as a witness or was charged as an unindicted co-conspirator, aider or abettor, or defendant.
12. Any statements or documents, including but not limited to grand jury testimony and/or trial testimony executed by any potential prosecution witness at the trial in this action which the prosecution knows, or through reasonable diligence should have reason to know, is false.
13. The existence and identification of each occasion on which any witness, including any witness who is or was an informer, accomplice, co-conspirator or expert, has testified before any court or other tribunal or body, or otherwise has given an official narration in relation to the Mr. Scrushy, the investigation or the facts of this case.
14. Any written or oral statements, whether or not reduced to writing, made by any potential prosecution witness, which in any way contradicts or is inconsistent with or different from other oral or written statements, whether or not reduced to writing made by any person, whether or not a witness, which in any way contradicts or is inconsistent with or different from any statements made by a prosecution witness.
15. Any requests prepared by the prosecution for permission to grant immunity or leniency for any witness, regardless of whether such request was granted.
16. Any and all documents relating to the educational background and/or professional training of any witness the United States intends to call at trial, including but not limited to resumes, personnel records, and professional reviews or evaluations.

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17. Any and all other records and/or information that arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the prosecutor's evidence.
18. The same records and information requested in the items above with respect to each non-witness declarant whose statements will be offered in evidence;
19. The names and addresses of all persons whom the prosecution, its agents and representatives believe to have relevant knowledge or information with reference to the charges contained in the Indictment but whom the prosecution does not intend to call as witnesses at trial on the ground that such a decision reflects that the person does not support the government's allegations in the indictment
20. Copies of all documents, statements, and any other evidence including but not limited to a written summary of all oral evidence and statements now known to the United States or that may become known to the United States or that may become known or that through due diligence may be learned from the investigating agents or witnesses in this case or persons interviewed in connection with the investigation, that are exculpatory in nature or favorable to Mr. Scrushy or may lead to material that is exculpatory in nature or favorable to Mr. Scrushy, or tend to negate or mitigate the guilt of the defendant, as to the offenses charged, or would tend to reduce the punishment therefore. Include the names, addresses, and telephone numbers of all persons who know or may know of any favorable or exculpatory; also include all written or recorded statements or the substance of oral statements by any person that are in any way conceivably inconsistent with the testimony or expected testimony any witness will give at trial and any other evidence that otherwise reflects upon the credibility, competence, bias, or motive of the United States' witnesses.
21. Copies of any and all records of law enforcement or other governmental agencies reflecting intradepartmental disciplinary action taken against any law enforcement or agency official who will testify in this proceeding, including all such records from any governmental agency for which the witness previously worked; and
22. Copies of any and all records of any law enforcement or other governmental agency reflecting any commendations, awards, or recognition of any kind received by, or requests for any commendations, awards or recognition of any

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kind made by any governmental agent or law enforcement officer for any work, action or conduct undertaken in connection with the investigation and prosecution of this case.

23. Please provide us with all information, including reprimands, suspensions, and counseling, in the personnel files of all law enforcement officers that the government expects to testify at trial that reflects any dishonesty of failure to comply with policies, procedures, requests, or orders of any law enforcement agency.

D. F.R. Cr. P. Rule 6

1. We request that the United States disclose the empanelment and adjournment dates of each grand jury that heard evidence concerning this case, the instructions provided to the grand jury before the Indictment was returned, and the voting record and record (i.e., transcript) of return in open court of the Indictment and what steps, if any, were taken to insure that grand jurors who heard this case did not have an interest in the issues (e.g., shareholders, employees or people with relatives who were shareholders or employees of HealthSouth).

E. 18 U.S.C. §§ 3500

1. Please take steps to insure that the raw interview notes taken by federal law enforcement officers are preserved, whether or not they became the basis for creating more formal interview memoranda (e.g., FBI 302's). Please provide those raw notes when they include material requested in one of these discovery requests (e.g., statement by a co-conspirator, *Brady* material, or 3500 material).
2. Please provide all statements of any witness the government intends to call during its case in chief or has indicated it will call in its rebuttal case (based on its present thinking). These should include transcripts of grand jury testimony, testimony in other proceedings (e.g., Rule 11 proceedings, other cases), formal memoranda of interviews, FBI 302 forms or their equivalent, notes taken from interviews of such witnesses whether written by attorneys or agents.

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F. F. R. Cr. P. 17

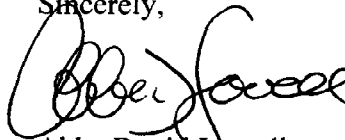
There are numerous documents and tangible items in the possession of third parties (e.g., HealthSouth) that are pertinent to Mr. Scrushy's defense but which the government should not have any responsibility to obtain. The solution is for both parties to be able to utilize F. R. Cr. P. 17 to seek documents for a return date before trial. We both should agree to this procedure.

G. F. R. Evid. 404(b)

1. Please provide notice and the evidence of any crimes, wrongs, or acts concerning Mr. Scrushy that the government will seek to have admitted pursuant to F. R. Evid. 404(b).

We understand that the timing of the disclosure of certain aspects of our request is part of the proposed Scheduling Order. Where that is not the case, we ask for disclosure of those items on the dates most analogous to a provision of that Order and in no instance later than March 26, 2004. Thank you for your prompt attention to these requests.

Sincerely,

A handwritten signature in black ink, appearing to read "Abbe David Lowell", written over a horizontal line.

Abbe David Lowell
Thomas V. Sjoblom